Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1805

JOHN W. McTIGHE - - - - Petitioner

versus

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.
FERNANDO MACIAS RENDON
DR. HAROLD L. KIRKPATRICK and
EDWARD SIMMEN - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ARTHUR R. SAMUEL
BROADUS AND SAMUEL
1506 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Petitioner

May 31, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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FERNANDO MACIAS RENDON
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EDWARD SIMMEN - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, John W. McTighe, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky rendered on March 16, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky affirming the dismissal of petitioner's complaint for lack of jurisdiction over the respondents, lack of jurisdiction over the subject matter, and improper venue was filed on October 20, 1978 and was not published.

The order of the Supreme Court of Kentucky denying discretionary review in the petitioner's case was entered March 13, 1979. The mandate in petitioner's case was entered by the Court of Appeals of Kentucky on March 16, 1979. Copies of the above-mentioned opinion, orders and mandate are attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was rendered on August 25, 1978. Petitioner's timely petition for rehearing in the Court of Appeals of Kentucky was denied on October 20, 1978. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on March 13, 1979. The mandate of the Court of Appeals of Kentucky was issued in the petitioner's case on March 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether a "non-public figure" is entitled to the same pre-trial range of discovery in a defamation action in order to remove a qualified privilege of a defendant as a "public figure" was held to have in *Herbert* v. *Lando et al.*, —— U. S. —— (1979) since the burden of proof is identical?

2. If the answer to question one is YES, was the petitioner unconstitutionally deprived on his right to due process of law and equal protection of the law under Kentucky's long-arm statute and civil rules of discovery for being denied this range of discovery?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in the 14th Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner filed his complaint on March 29, 1977 and the Respondents filed their answer on August 18, 1977 upon agreement of an extension of time to file the answer. Petitioner then set up depositions with proper notice pursuant to CR 30 of the Kentucky Rules of Civil Procedure, however the respondents filed a motion to dismiss with the Jefferson Circuit Court and a motion to restrain the petitioner from taking depositions until the Circuit Court ruled on the motion to dismiss because of the expense in taking out of state depositions. The Circuit Court sustained the motion to restrain the petitioner from taking depositions and subsequently entered an order of dismissal on November 21, 1977. The petitioner had one deposition scheduled and arrangements were being made to take others at the time the order for dismissal was entered. Notice of appeal was filed on December 2, 1977 (Transcript of Record, hereinafter designated T.R.) (T.R., p. 90).

On August 28, 1978 the Kentucky Court of Appeals in an unpublished opinion affirmed the decision of the Circuit Court. Petitioner's timely petition for rehearing was denied by the Kentucky Court of Appeals on October 20, 1978 and petitioner's timely motion for discretionary review was denied by the Supreme Court of

Kentucky on March 13, 1979. Consequently, the Court of Appeals of Kentucky on March 16, 1979 issued the mandate in petitioner's case.

In the fall of 1972, petitioner enrolled in the graduate school at the University of Americas at Puebla, Mexico for work toward a Master of Arts Degree in Latin-American History upon the recommendation of his undergraduate advisor, Sister Rose Jean Powers, professor of history at Brescia College in Owensboro, Kentucky (T.R., p. 86).

Petitioner had completed all his course study and only needed an oral board to complete his degree requirements, however, in the Spring of 1976 he became ill with a stomach disorder and returned to Kentucky. While the petitioner was in Kentucky a dispute over policy matters occurred between the administration and faculty of the University of the Americas followed by a faculty strike which closed the University and prevented access to the campus and classrooms by the actions of the faculty and some students.

Upon the petitioner's return to the campus, he found the University in chaos and disorganization. He nevertheless met with his board professors, was given his oral boards by them, and recommended for his degree (T.R., pp. 80-82). The Administration refused to give petitioner his degree after he made every effort to obtain it while in Mexico and upon his return to Kentucky he requested Sister Rose Jean Powers to inquire into the matter for him. She wrote the respondent Fernando Macias Rendon, President of the University, and received a reply from Edward Sim-

men, Director, Division of Graduate Studies at the University and also a respondent to this action. Dr. Harold L. Kirkpatrick, respondent, is Administrative Vice-President at the University.

Respondent Simmen's reply alleged the petitioner "aligned himself with communist elements that openly tried to close this private institution and nationalize it" (T.R., p. 75); that petitioner "did a very foolish thing when he became involved in a political entanglement" (T.R., p. 75); "aims to destroy us" (T.R., p. 75); and further stated that "I, personally, would not recommend anyone of that inclination to teach in any school, or for that matter, hold any position where confidence is a requirement" (T.R., p. 75).

These letters are made a part of the appendices hereto. The petitioner in his complaint alleged that the respondent Simmen made these statements falsly and requested damages for injury to his reputation in the teaching profession. The respondent Simmen answered by alleging the statements to be privileged.

The Court of Appeals of Kentucky, at page 4 of its Opinion stated:

> "We agree that if the letter had been of a non-privilege nature if could have possibly formed the bases for a cause of action since the letter was unsealed and therefore published in the Commonwealth."

The petitioner was not given the opportunity to prove the language from Simmen was a "knowing and reckless falsehood" in order to remove the privilege.

In other words, the petitioner was thereby denied the opportunity to prove one's acts "causing tortious injury . . . in the commonwealth". KRS 454.210 (2) (a) (3).

REASON FOR GRANTING THE WRIT

The Decision Below Affirming the Trial Judge's Order of Dismissal Without Affording the Petitioner the Opportunity of Discovery in Order to Remove the Privilege From the Respondent Simmen's Communication Conflicts With Previous Decisions of the Supreme Court.

In *New York Times* v. *Sullivan,* 376 U. S. 254 (1964) "public officials" suing for defamation must prove knowing and reckless falsehood in order to establish liability. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967) extended the ruling to "public figures".

Where "non-public figures" are involved, the same proof is required in order to establish abuse of a qualified privileged, *i.e.* knowing or reckless falsehood. *Gertz* v. *Robert Welch Inc.,* 418 U. S. 323 (1974); W. Prosser, *Torts* § 115 (4th ed. 1971).

"Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages." *Herbert* v. *Lando et al.,* —— U. S. —— (1979). 50 Am. Jur. 2d § 455; 53 C.J.S. § 213.

The courts of Kentucky achieved a result against this petitioner identical to that which the defendants Lando and CBS requested, that is, "to modify firmly

established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehoods by the publisher of an alleged liable, elements that are critical to the plaintiff . . .". *Herbert* v. *Lando et al., supra.*

To accept such modification would "erect an impenetrable barrier" for a plaintiff. *New York Times* v. *Sullivan,* 376 U. S. at 286.

Mr. Justice White writing the majority opinion in *Herbert* v. *Lando et al.,* —— U. S. —— (1979) stated that "Intent, motive, and malice" were necessary to counter qualified privilege and found the same burden to exist for a plaintiff where he must "focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher."

In the case at bar as in *Herbert* v. *Lando et al., supra,* the burden to prove defamation is identical. The "non-public figure" must take on the same burden to remove the qualified privilege as the burden the "public figure" must accept to prove defamation.

The same elements (defendants state of mind and defendants doubts as to the veracity of his sources) are of "central importance". *Herbert* v. *Lando et al.,* 73 F.R.D. 387, 395, 396 (SD NY 1977).

The Kentucky courts failed to allow discovery of this nature to occur. The case was summarily dismissed before depositions could be taken, although one deposition was scheduled and others were being arranged.

Without discovery, it is impossible to draw reasonable conclusions from the evidence. Further, if more than one conclusion can be drawn, the determination of the question as to whether the priviledge has been abused is for the jury. W. Prosser, *Torts* § 115 (4th ed. 1971).

KRS 454.210 (2) (a) (3) permits personal jurisdiction over non-resident defendants who commit torts in Kentucky. The petitioner in being denied the opportunity by discovery to determine whether respondent Simmen lost his qualified privilege thereby is also denied use of KRS 454.210 (2) (a) (3) since the loss of the qualified privilege may account for tortious injury to the petitioner in Kentucky. Denial of jurisdiction in this manner deprives the petitioner of due process of law and equal treatment under the Statute as well as the civil rules of discovery.

CONCLUSION

Since the burden of proof required by the First and Fourteenth Amendments is identical for a "public figure", and a "non-public figure" removing a qualified privilege, before damages can be recovered for defamation, it is respectfully submitted that this petitioner be granted the same opportunities of discovery that Lt. Col. Herbert was granted recently by this Court.

Failure to do so deprives the petitioner of his constitutional right to due process of law in obtaining personal jurisdiction over the respondents and equal pro-

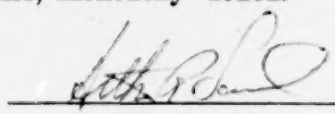
tection of law in his rights of discovery and use of the Kentucky Statute.

Respectfully submitted,

ARTHUR R. SAMUEL
BROADUS AND SAMUEL
1506 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Arthur R. Samuel, counsel for petitioner, certify that the attached Petition for Writ of Certiorari and Letter of Appearance was served on respondent by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on May 31, 1979, addressed to respondent's counsel, Hon. Stephen F. Schuster, 1200 One Riverfront Plaza, Louisville, Kentucky 40202.



ARTHUR R. SAMUEL
BROADUS AND SAMUEL
1506 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Petitioner